

In the Matter of Merchant Mariner's Document No. Z-822669-D1 and
all other Seaman Documents

Issued to: HERCULES E. VINCENT

DECISION AND FINAL ORDER OF THE COMMANDANT
UNITED STATES COAST GUARD

1388

HERCULES E. VINCENT

This appeal has been taken in accordance with Title 46 United States Code 239(g) and Title 46 Code of Federal Regulations 137.30-1.

By order dated 29 May 1962, an Examiner of the United States Coast Guard at New Orleans, Louisiana suspended Appellant's seaman documents for six months outright plus six months on twelve months' probation upon finding him guilty of misconduct. The two specifications found proved allege that while serving as a fireman-watertender on board the United States SS SISTER KATINGO under authority of the document above described, on 12 April 1962, Appellant failed to perform his duties; on 11 May 1962, Appellant addressed the Master with abusive language.

On 11 May 1962, Appellant was served with the charge, specifications and summons to appear for a hearing at 1400 on 14 May 1962. When Appellant had not appeared by 1600 on the latter date, the hearing was opened and continued on the following day. Since Appellant was not present or represented on 15 May and had not contacted the Coast Guard in the interim, the hearing was conducted in absentia after the Examiner entered pleas of not guilty on behalf of the Appellant.

The Investigating Officer introduced in evidence a certified copy of extracts from the Shipping Articles for the voyage, a certified copy of an entry in the ship's Official Logbook pertaining to the first specification, and the testimony of two Deputy Shipping Commissioners who were present during the incident referred to in the second specification.

At the end of the hearing, the Examiner rendered a written decision in which he concluded that the charge and two specifications had been proved. Service of the decision on Appellant was not accomplished until 1 October 1962.

FINDINGS OF FACT

From 14 March to 11 May 1962, inclusive, Appellant was serving as a firemanwatertender on board the United States SS SISTER KATINGO and acting under authority of his document while the ship was on a foreign voyage.

On 12 April 1962, Appellant failed to turn to on his assigned watch and duty station while the ship was at Gdynia, Poland. This matter was logged and Appellant was fined one day's wages of \$12.96 to be deducted at the end of the voyage. The entry was read to Appellant and a copy of it was given to him on 12 April. His reply was, "No comment". The entry was signed by the Master and witnessed by two engineering officers.

About 0930 on 11 May 1962 at New Orleans, two Deputy Shipping Commissioners were in the Master's quarters preparing for the pay-off at the end of the voyage and a sign-on for another voyage when Appellant entered in a somewhat intoxicated condition. Appellant asked one of the Shipping Commissioners to pay him for the voyage. This matter was not pursued after the Shipping Commissioner told Appellant that action might be taken against his seaman's document since his name appeared in logbook entries made during the voyage.

When the Master asked Appellant for the bottle which was in his pocket, he addressed the Master insubordinately stating that Appellant had no respect for the Master, he was not an honorable man, and he would "pay" for requiring Appellant to surrender the bottle. There was no foul or profane language used by Appellant but his attitude toward the Master was very belligerent. Eventually, Appellant gave the bottle to the Coast Guard Investigating Officer who arrived on the scene during the incident and indicated that action might be taken against Appellant's document for disobeying the Master. The Investigating Officer gave the bottle to the Master and it was disposed of over the side of the ship.

Later on this same date, Appellant signed a copy of the charge, specifications, and summons form to appear at a hearing on 14 May, thereby acknowledging that he was informed of the complaints therein, the nature of the proceedings, and his right to counsel.

Appellant's prior record consists of an admonition in 1957 and a one month outright suspension plus five months on twelve months' probation in July 1961 for intoxication, disobedience of a lawful order and brandishing an open knife on board ship. This five months' suspension which was placed on probation is included in the present order against Appellant's documents.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Examiner. It is contended that Appellant was never served with the written charges, given notice of the hearing, or advised of his rights. Appellant did not appear because he was afraid he could not get a fair hearing in New Orleans after twice being threatened by Coast Guard officials with the loss of his document prior to any investigation. The hearing was not fair not only due to Appellant's absence but also because he was permitted only three days to prepare his defense and both witnesses were in the hearing room until just before one of them testified.

The date of the logbook entry, concerning the first specification, is not clear and the entry was not read to Appellant until four days after the alleged offense on 12 April. A few minutes past 0800 on this date, the Master sent Appellant ashore for dental treatment.

There was no jurisdiction over Appellant relative to the incident on 11 May because it occurred after Appellant used "abusive" language to the Master on this date.

In conclusion, it is submitted that the charge and specifications should be dismissed, the hearing reopened in New York, or the period of outright suspension modified.

APPEARANCE ON APPEAL: Lee Pressman, Esquire, of New York City
 by Ned R. Phillips, of Counsel.

OPINION

Appellant's statement, in his notice of appeal, that he was not given notice of the hearing and his statement in a later affidavit that he has no recollection of any such notice are inconsistent with Appellant's attempt, in the same affidavit to justify his failure to attend the hearing because he was afraid he would not be given a fair hearing in New Orleans. Counsel's brief on appeal also takes the latter position after conceding that "the person charged was personally served and thus received notice of the hearing". This concession is accepted, particularly since Appellant's signature is on a copy of the charge, specifications and summons form which is in the record and because it is difficult to believe that Appellant does not remember receiving the original of this document since he distinctly remembers two so-called threats against his seaman's document as described in the above findings of fact based on the testimony of the witnesses (R. 7, 9). Although Coast Guard officials have no authority to intimidate seamen by improper actions to deprive them of the use of their

documents, I think it is quite clear in this case that Appellant knew from his past experience in July 1961 that he could not be involuntarily ordered to release his document except at a hearing conducted by a civilian hearing examiner who is required by law to act in an impartial manner based on the evidence before him.

Appellant had ample time to retain or consult with counsel during the three days prior to the hearing but he deliberately took matters into his own hands and simply did not appear as ordered or thereafter contact the Coast Guard for some time as is shown by the fact that the Examiner's decision of 29 May 1962 was not served on Appellant until 1 October 1962.

These factors pertaining to the questions of notice and adequacy thereof seem to me to establish complete lack of good faith and will not be entertained as reasons for reopening the hearing.

The record does not indicate that there was any specific prejudice to Appellant as the result of the presence of both witnesses at the hearing until prior to the taking of testimony. Appellant claims only that this breach of the regulations (46 CFR 137.20-60) denied Appellant his right to a fair trial. I do not agree with this in the absence of something more than a showing of the possibility of substantial prejudice.

With respect to Appellant's failure to perform his duties on 12 April, the logbook entry was ostensibly made on the same date since "12 April - 0800 - 1600" is at the top of the entry. There is no proper evidence to contest this as the date the entry was made or other findings based on the entry since Appellant's affidavit on appeal is not admissible for this purpose. Appellant had an opportunity to submit evidence at the hearing but he chose not to do so. Furthermore, there is no indication that the \$12.96 fine imposed by the Master in the log entry was not deducted from Appellant's wages at the end of the voyage. Seamen do not submit lightly to such deductions unless they are justified.

There was jurisdiction over Appellant with respect to the incident on 11 May. One of the Deputy Shipping Commissioners testified that Appellant requested to be paid off just before the alleged offense took place and Appellant was not paid. Regardless of the latter, jurisdiction is established by the fact that the Shipping Articles shown Appellant signed off on 11 May and, therefore, he was paid for his services on this date whether or not any were performed. Thus, the contention that Appellant was not then in a status of employment is contrary to convincing and credible evidence in the record.

I think there is no question that the language used by Appellant was "abusive" despite the absence of foul or profane words. The statements referred to in the findings of fact were abusive as well as insulting, when addressed to the ship's Master, in the sense that they openly showed Appellant's disrespect for the authority and integrity of the Master. See Commandant's Appeal Decision No 1297. The lack of respect for the Master's authority is emphasized by the fact that Appellant eventually handed the bottle to a Coast Guard officer rather than the Master.

For these reasons, it is my opinion that no grounds for dismissal, reopening the hearing, or modification of the order have been established. It is noted that the order provides for only one month outright suspension in addition to the five months' outright suspension which is the result of Appellant's violation of the twelve months' probation imposed in July 1961.

ORDER

The order of the Examiner dated at New Orleans, Louisiana, on 29 May 1962, is AFFIRMED.

D. McG. MORRISON
Vice Admiral, United States Coast Guard
Acting Commandant

Signed at Washington, D. C., this 25th day of April 1963.